

In the Supreme Court of the United States

OCTOBER TERM, 1924

KUNHARDT & COMPANY, INC. APPELLANT	} No. 141
v.	
THE UNITED STATES	

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from the judgment of the Court of Claims sustaining the Government's demurrer to the amended petition of Kunhardt & Company, Inc., in which the appellant claimed \$35,000, due it from the United States by reason of the depreciation of the value of the schooner *Herbert May* owing to the decline in its market value. The material allegations of the amended petition are in substance as follows:

On September 10, 1918, the Director of Aircraft Production issued to appellant a purchase order (Exhibit A, Rec. p. 6) to grow and ship a minimum of 50,000 to a maximum of 75,000 bushels of castor

beans from Puerto Cortez, Honduras, which purchase order was amended September 20, 1918 (Ex. B-1, Rec. p. 10), and incorporated into contract No. 4688 (Ex. B, Rec. p. 8) entered into between the said appellant and Captain O. R. Ewing, representing the United States.

In the said contract and purchase orders the deliveries were to be made f. o. b. vessel at Puerto Cortez or at the option of the Government, at Gulf ports in the United States.

On November 6, 1918, the Government issued to appellant another purchase order (Ex. C, Rec. p. 11) for a minimum of 75,000 to a maximum of 100,000 bushels of castor beans to be grown or purchased in Guatemala or Honduras, Central America, which purchase order was later incorporated in contract No. 5346 (Ex. D, Rec. p. 12). In the said contract and purchase order deliveries were at \$0.098 per pound, net landed weight ex dock New Orleans (Rec. p. 12). The said contract and purchase order comes out of and takes the place of contract Exhibit B and purchase orders Exhibit A and Exhibit B-1 (Rec. p. 6, 8, 10). The Government officers urged appellant to agree to change the prior orders and contracts, Exhibits A, B, and B-1, so that appellant could deliver the beans in New Orleans as the Government was having difficulty finding transportation for the beans and the appellant had the schooner *Herbert May*.

That at the time appellant was negotiating for the sale of the *Herbert May*, for which it had an

offer of \$75,000, the Government insisted that the appellant provide transportation for the beans from Honduras and Guatemala to New Orleans and as the *Herbert May* was the only means of transportation available to the appellant, it was forced to retain possession of the schooner (Rec. p. 4, par. 10).

An attempt was made to cancel contract No. 5346 (Ex. D, Rec. p. 12), January 30, 1919, by written agreement (Ex. D-1, Rec. p. 21) by which appellant was to receive \$35,000, but this was never approved by the Board of Contract Review of the Bureau of Aircraft Production as required by Article IV of the said instrument.

On May 17, 1919, the said contract No. 5346 was effectively cancelled by contract No. 5346-A (Ex. E, Rec. p. 23) and appellant paid in settlement \$24,478.78, appellant reserving its claim therefrom for depreciation on the schooner *Herbert May*.

That prior to receiving purchase order of November 6, 1918 (Ex. C, Rec. p. 11), appellant had no use for the *Herbert May* and at the time it was negotiating for said purchase order it had an offer of \$75,000 for its sale, and that after the cancellation by the Government it had no further use for the boat and immediately began negotiations for the sale of the *Herbert May*, but could obtain only \$40,000, thus entailing a loss in depreciation of the value of the schooner of \$35,000, which it seeks to recover in this action (Rec. p. 5, par. 13).

ARGUMENT

The record shows (Rec. p. 4, par. 9) that at a meeting in Washington in October prior to the execution of the purchase order, Exhibit C, of November 6, 1918 (Rec. p. 11) the Government officers urged appellant to agree to change the prior purchase orders and contract Exhibits A, B, and B-1, so that the appellant could deliver the beans at New Orleans as the Government was having difficulty in finding transportation for the beans and the appellant had the schooner *Herbert May*.

Referring to contract No. 4688, Exhibit B (Rec. p. 8) into which purchase orders Exhibit A and Exhibit B-1 are incorporated, we find the following provision:

The items accepted should be packed for domestic shipment and furnished f. o. b. vessel at Puerto Cortez or at the option of the Government at any United States port on the Gulf of Mexico.

which shows that the beans were to be delivered at the option of the Government at any United States port on the Gulf of Mexico so that under the provisions of the contract it was necessary for appellant to provide means of transportation should the Government exercise its option. Attention is further directed to the said contract wherein it is provided that the price is to be \$3 per bushel, f. o. b. vessel at Puerto Cortez, or if the Government exercises its option to accept delivery at Gulf ports in the United

States, the price is to be \$3.50 per bushel, f. o. b. docks, contractor to pay all import duties.

Referring to contract No. 5346, Exhibit D (Rec. p. 12), into which purchase order Exhibit C is incorporated, we find the following provisions:

75,000 bushels minimum to 100,000 bushels maximum (one bushel equals 46 pounds), good quality, whole, sound, mature castor beans to be shipped in sound and good condition having been properly harvested and hulled at \$.098 per pound, net landed weight ex dock New Orleans.

These provisions in the said contracts clearly indicate that the appellant contracted to deliver the castor beans at New Orleans or some other Gulf port in the United States. If the schooner *Herbert May* was the only vessel available to appellant to make such shipments, it was necessary to retain her or to supply some other means of transportation under the terms of the said contracts and purchase orders.

To insure the deliveries in accordance with the provisions in the said contract the Government required the appellant to furnish a bond in the sum of \$15,000 (Rec. p. 12).

The appellant therefore being under contractual obligation to transport and deliver the said castor beans at New Orleans or to some other port on the Gulf of Mexico in the United States, it was of no concern to the Government whether appellant retained its schooner *Herbert May* for this purpose or secured some other means of transportation. The conten-

tion of appellant that he was negotiating for the sale of the schooner *Herbert May* for the price of \$75,000 about the time he was making the aforesaid contract with the Government, and that he was able after the cancellation of the contracts to sell the said schooner for only \$40,000, thereby incurring a loss of \$35,000, even though admitted, fixes no liability or obligation on the part of the United States Government to pay the amount claimed. It appears that the market value of the schooner decreased in the amount claimed during the period the contract was being performed. For the depreciation of the value of the schooner owing to the decline in market values of such vessels the United States is not liable.

The record in this case shows no liability on the part of the United States Government to pay the amount claimed. The demurrer to appellant's amended petition was necessarily sustained by the Court of Claims and judgment rendered for the Government. The action of the Court of Claims in sustaining the Government's demurrer should be affirmed.

JAMES M. BECK,
Solicitor General.

ROBERT H. LOVETT,
Assistant Attorney General.

LISLE A. SMITH,
Special Assistant to the Attorney General.

OCTOBER, 1924.